(12)

Supreme Court, U.S.
FILED
MAR 1 1999
OFFICE OF THE CLERK

No. 97-1927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,

Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR PETITIONERS

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Counsel for Petitioners

24pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

I. PETITIONERS DID NOT VIOLATE THE FOURTH AMENDMENT BY ALLOWING NEWS MEDIA TO ACCOMPANY THEM AS THEY EXECUTED THE WARRANT 1

A. Officers Are Responsible for Third Parties Who Accompany Them, Whose Conduct Is Subject to the Same Constitutional Limits 2

B. The Fourth Amendment Permits Officers to Be Accompanied by Third Parties to Aid in Discharging the Law Enforcement Mission 5

C. Petitioners Acted Reasonably by Allowing News Media to Observe and Record Them Executing the Search Warrant in This Case 11

II. THE FOURTH AMENDMENT'S HISTORY DOES NOT SUPPORT RESPONDENTS 12

III. THE DEFENSE OF QUALIFIED IMMUNITY IS PROPER IN THIS CASE 16

A. Qualified Immunity Is Proper Under *Mitchell v. Forsyth* Because the Law Was Not Clearly Established at the Time Petitioners Acted 16

B. Qualified Immunity Is Proper Under *Anderson v. Creighton* Because It Was Not Apparent that Petitioners Violated the Fourth Amendment 18

CONCLUSION 20

TABLE OF AUTHORITIES

PAGE

Cases

Anderson v. Creighton, 483 U.S. 635 (1987) 18, 19, 20
Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995) 8, 17
Bills v. Aseltine, 958 F.2d 697 (6th Cir. 1992) 2
Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) 20
Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) 2, 17
Byars v. United States, 273 U.S. 28 (1927) 2
Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1097 (1995) 19
Chimel v. California, 395 U.S. 752 (1969) 9
City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 10
Commonwealth v. Farrar, 413 A.2d 1094 (Pa. Super. 1979) 6
Coolidge v. New Hampshire, 403 U.S. 443 (1971) 9
Dalia v. United States, 441 U.S. 238 (1979) 5, 8, 14
Elkins v. United States, 364 U.S. 206 (1960) 3
Entick v. Carrington, 19 How. St. Tr. 1029 (K.B. 1765) . 13
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 16, 20
Higbee v. Times-Advocate, 5 Med. L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980) 17
Horton v. California, 496 U.S. 128 (1990) 9
Kelley v. State, 315 S.E.2d 916 (Ga. App. 1984) 5
Lopez v. United States, 373 U.S. 427 (1963) 4
Marcus v. Search Warrant, 367 U.S. 717 (1961) 14
Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 14
Maryland v. Buie, 494 U.S. 325 (1990) 9
Michigan v. Summers, 452 U.S. 692 (1981) 11
Mitchell v. Forsyth, 472 U.S. 511 (1985) 16, 17, 18
Moncrief v. Hanton, 10 Med. L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984) 17
People v. Superior Ct., 598 P.2d 877 (Cal. 1979) 6

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

People v. Turner, 57 Cal. Rptr. 854 (Ct. App. 1967) 6
Prahl v. Brosamle, 295 N.W.2d 768 (Wis. App. 1980) 17
Procunier v. Navarette, 434 U.S. 555 (1978) 18
Scott v. State, 559 So. 2d 269 (Fla. App. 1990) 17
Scott v. United States, 436 U.S. 128 (1978) 10
Semayne v. Gresham, 77 Eng. Rep. 194 (K.B. 1604) 12
Stanford v. Texas, 379 U.S. 476 (1965) 14
State v. Klosterman, 317 N.W.2d 796 (N.D. 1982) 6
State v. Wade, 544 So. 2d 1028 (Fla. App. 1989) 6
Sullivan v. Town of Salem, 805 F.2d 81 (2d Cir. 1986) ... 19
United States v. Caceres, 440 U.S. 741 (1979) 4
United States v. Clouston, 623 F.2d 485 (6th Cir. 1980) (per curiam) 6, 7
United States v. Lanier, 117 S. Ct. 1219 (1997) 17
United States v. Martin, 600 F.2d 1175 (5th Cir. 1979) ... 7
United States v. McKeever, 906 F.2d 129 (5th Cir. 1990) 6
United States v. Medlin, 842 F.2d 1194 (10th Cir. 1988) .. 2
United States v. Ramirez, 118 S. Ct. 992 (1998) 5, 8
United States v. Robertson, 21 F.3d 1030 (10th Cir. 1994) 7
United States v. Sigal, 341 F.2d 837 (3d Cir.), *cert. denied*, 382 U.S. 811 (1965) 7
United States v. White, 401 U.S. 745 (1971) 4, 9
Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) ... 13
Wallace v. King, 626 F.2d 1157 (4th Cir. 1980), *cert. denied*, 451 U.S. 969 (1981) 20
Walter v. United States, 447 U.S. 649 (1980) 13
Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763) 13
Wilson v. Layne, 141 F.3d 111 (1998) (en banc), *cert. granted*, No. 98-83 ..... 10, 17, 18

TABLE OF AUTHORITIES
(continued)

PAGE

Constitutional Provisions, Statutes, Rules, Policies

U.S. CONST. amend. IV ..... *passim*
18 U.S.C. § 3105 ..... 6, 7, 8
U.S. Dep't of Justice, *United States Attorneys' Manual* § 1-7.000 (Media Policy), section VII (Assisting the News Media) (as amended Jan.14, 1993) 19

Other Authorities

4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769) 12
2 WAYNE R. LAFAVE, SEARCH AND SEIZURE (1996) 2
NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937) 15
Julius J. Marke, *The Writs of Assistance Case and the Fourth Amendment*, in ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER 351 (ed. Morris D. Forkosch 1966) 15

REPLY BRIEF FOR PETITIONERS

The Court's ruling in this case is one of first impression. The Court has never before articulated any constitutional limits upon officers deciding when third parties may accompany them as they execute a warrant or perform other law enforcement functions. Instead, these kinds of determinations have generally been left to the officers' reasonable discretion about how best to further their law enforcement mission, within all of the familiar constraints otherwise imposed by the Fourth Amendment. Petitioners contend that the pragmatic "reasonableness" test is the proper approach to this issue, and that their conduct was reasonable in this case. Petitioners strongly disagree with the rigid, *per se* rule offered by respondents, which would flatly prohibit officers from being accompanied by prosecutors, news media, civilian employees, or other third parties who are not actively involved in executing a warrant, even when the officers may reasonably judge that the presence of such individuals would assist them or aid their law enforcement mission.

Even if the Court were to disagree with petitioners on the threshold constitutional issue, their defense of qualified immunity should be upheld here. At the time petitioners acted, the law was not clearly established, and it was not apparent, that their conduct violated the Fourth Amendment.

I. PETITIONERS DID NOT VIOLATE THE FOURTH AMENDMENT BY ALLOWING NEWS MEDIA TO ACCOMPANY THEM AS THEY EXECUTED THE WARRANT.

Petitioners' own actions in obtaining and executing the search warrant in this case were proper and did not violate the Fourth Amendment. *See* Pet. Br. 11-14. Respondents' further claim that the officers' decision to allow members of the news media (or any third parties, such as petitioner McLean, the assistant prosecutor) to accompany them merely to observe and record their execution of a warrant *ipso facto* violates the

Fourth Amendment is not well taken. In the absence of any close precedent to guide the Court's inquiry in this regard, petitioners respectfully suggest that such claims should be judged by a two-part test: (1) did the actions of the third parties themselves comply with the restrictions imposed by the Fourth Amendment; and (2) could the presence of the third parties reasonably be judged to assist the officers or to further their law enforcement mission. If the answer to both questions is in the affirmative, as in this case, then the Fourth Amendment is not violated.

A. Officers Are Responsible for Third Parties Who Accompany Them, Whose Conduct Is Subject to the Same Constitutional Limits.

Professor LaFave, widely recognized as an authority on the Fourth Amendment, concludes that when law enforcement officers execute a warrant, they may be accompanied by third parties, but "the non-law enforcement personnel must, in effect, be governed by the same rules as law enforcement personnel in considering their conduct during the search." 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.10(d) (1996) (quotation omitted). These sensible constraints would appear to flow from standard principles of agency law. *See, e.g., Byars v. United States*, 273 U.S. 28, 33 (1927) (in any such joint endeavor, "the effect is the same as though [the officer] had engaged in the undertaking as one exclusively his own"). Thus it seems clear that if officers — either wittingly or unwittingly — facilitate a search or seizure by a third party that would violate the Fourth Amendment if the officers had undertaken it themselves, then the officers may properly be charged with the resulting constitutional violation. Many decisions are to this effect, *see, e.g., Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995); *Bills v. Aseltine*, 958 F.2d 697, 705 (6th Cir. 1992); *United States v. Medlin*, 842 F.2d 1194, 1199 (10th Cir. 1988), and this conclusion seems to accord with the Court's rejection of the

"silver platter" doctrine, *see Elkins v. United States*, 364 U.S. 206 (1960).

In this case, the federal officers were acting pursuant to a valid search warrant. Pet. App. 30a. Their own actions in executing the warrant were proper, as the courts held both in this case, *see* Pet. App. 6a; *id.* at 34a ("otherwise valid search"), and in the related criminal proceedings where Mr. Berger's motion to suppress evidence was denied, *see* E.R. Tab 5, Exh. G, at 4-5. Although respondents occasionally take issue with these conclusions, particularly concerning whether the officers entered the Bergers' residence without consent, *see* Resp. Br. 5-7, 28-30, they fail to note that no search occurred there and that even the court below expressly held that the issue of consent was readily resolved in favor of the officers by reference to the audio recorded at the site, which definitely indicated that consent was given, *see* Pet. App. 6a.

Respondents also assert, however, that the news media themselves engaged in a search and seizure in this case, which was unauthorized by the warrant and hence violated the Fourth Amendment. Resp. Br. 21-23. Under the approach set forth above, the soundness of this assertion is critical to the constitutional inquiry. Yet respondents offer virtually no legal analysis to support this assertion. Their sole rationale for the claim that the media engaged in an actual search or seizure is that eavesdropping on private conversations, and the capturing of oral statements made in those conversations, implicate the Fourth Amendment. *Id.* at 21-22.

These statements are correct as far as they go, but they have little bearing on the facts of this case. The Court's rulings that have protected the sanctity of conversations which occur solely among private individuals do not control statements made to federal law enforcement officers who are known to be such, who announced their authority upon their arrival, and indeed who bore the name "FEDERAL AGENT" emblazoned on their

clothing. The central question here is whether respondents had a "reasonable expectation of privacy" in those conversations, and it is clear that they did not.

Indeed, the Court has consistently held that there is no reasonable expectation of privacy even in private conversations, where one party turns out to be a government agent, even if the complaining party was unaware of this fact. *See, e.g., United States v. White*, 401 U.S. 745, 753 (1971) (no search because no invasion of any reasonable expectation of privacy, as "we are not prepared to hold that a defendant who has no constitutional right to exclude the [officer's] unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question"); *Lopez v. United States*, 373 U.S. 427, 439 (1963) (same result with respect to "conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose"); *see also United States v. Caceres*, 440 U.S. 741, 750-52 (1979) (rejecting individual's claim to privacy in this situation, which "does not raise any constitutional questions").[1]

Moreover, the officers and the media did not engage in a search or seizure or otherwise violate the Fourth Amendment by videotaping or audiotaping the events. These matters were fully canvassed in petitioners' opening brief, *see* Pet. Br. 14-17, and need not be rehashed here. The District Court was thus correct in stating that this case does not involve a situation in which the media actively participated in searching for or seizing evidence; rather, the media defendants were "simply observing the agents who were serving the warrant." Pet. App. 36a.

[1] The Court should reject respondents' apparent invitation to overrule these decisions. Resp. Br. 26-27 & nn.34-35.

B. The Fourth Amendment Permits Officers to Be Accompanied by Third Parties to Aid in Discharging the Law Enforcement Mission.

Respondents also contend that the Fourth Amendment is violated by the mere presence of third parties, such as members of the news media, when officers are executing a warrant. Their discussion hovers around two different justifications for this contention. The stronger claim is that the Fourth Amendment is violated whenever any third party accompanies officers who make an entry onto private property without consent in order to execute a warrant. The milder version is that the Fourth Amendment is violated when officers execute a warrant and are accompanied by third parties who are not actively assisting by joining in the execution of the warrant, regardless of whether their presence could reasonably be judged to aid the officers or to serve other legitimate law enforcement purposes. *See* Resp. Br. 12-34. Neither approach is supported by the Court's prior decisions.

As petitioners have stated, the proper legal framework for deciding this issue is the "general touchstone of reasonableness which governs Fourth Amendment analysis," including "the manner of executing a search warrant." *United States v. Ramirez*, 118 S. Ct. 992, 996 (1998). Indeed, this is the *only* language from the constitutional text that applies here, since "the specificity required by the Fourth Amendment does not generally extend to the means by which warrants are executed." *Dalia v. United States*, 441 U.S. 238, 257 (1979).

The extreme nature of respondents' position is shown by the fact that under either approach the mere presence at the search of petitioner McLean, the assistant prosecutor, would have been unlawful. Yet such occurrences are commonplace around the country, and they have never been held to violate the Constitution. *See, e.g., Kelley v. State*, 315 S.E.2d 916, 919 (Ga. App. 1984) (no Fourth Amendment violation where

"Assistant United States Attorney was a mere observer of the search and did not participate in it"); *United States v. McKeever*, 906 F.2d 129, 131-32 (5th Cir. 1990) (no Fourth Amendment violation where magistrate judge who issued search warrant attended and observed but "did not in any way assist with the search").

Respondents' stronger claim is refuted by a broad array of cases in which officers have invited along third parties as they execute a search warrant to help them determine what evidence should be identified and seized. The courts routinely uphold this practice as consistent with the Fourth Amendment, even though the presence of such individuals is typically not authorized by the warrant. *See, e.g., State v. Klosterman*, 317 N.W.2d 796, 803 (N.D. 1982) (victims of theft accompanied officers in search of defendant's home for stolen property); *People v. Superior Ct.*, 598 P.2d 877, 881 (Cal. 1979) (same); *Commonwealth v. Farrar*, 413 A.2d 1094, 1096-99 (Pa. Super. 1979) (private citizens accompanied officers executing search warrant in defendant's home for stolen property). The courts have approved this practice even when the third parties had no personal knowledge of the crime being investigated. *State v. Wade*, 544 So. 2d 1028, 1030-31 (Fla. App. 1989) (police allowed computer company employees to accompany them in executing search warrant inside a home to identify stolen computer equipment); *United States v. Clouston*, 623 F.2d 485, 486-87 (6th Cir. 1980) (per curiam) (police allowed telephone company employees to accompany them in executing search warrant inside a home and to identify telephone company property not listed in the warrant); *People v. Turner*, 57 Cal. Rptr. 854, 865 (Ct. App. 1967) (police allowed employer's fraud investigators to accompany them into employee's home to execute search warrant).

The federal statute which governs the service of search warrants, 18 U.S.C. § 3105, also refutes respondents' stronger claim. It states that a search warrant "may in all cases be served

by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, *except in aid of the officer on his requiring it*, he being present and acting in its execution." *Id.* (emphasis added). The plain language of this statute clearly contemplates that third parties are permitted to accompany officers who are executing a warrant, and to assist them, where the officers have authorized them to do so. Although this Court has never had occasion to construe the terms of this statute, the lower courts have so applied it. *See, e.g., United States v. Robertson*, 21 F.3d 1030, 1034 (10th Cir. 1994); *Clouston*, 623 F.2d at 486-87.[2]

Respondents' milder claim is also inconsistent with law and precedent. In essence, respondents argue that when officers enter private property to execute a warrant, they are permitted to do only what the terms of the warrant specifically authorize them to do, and to receive assistance only for that purpose. Any other actions or assistance that might reasonably be judged to further their law enforcement mission — even actions that do not constitute an independent search or seizure under the Fourth Amendment — are alleged to be prohibited. This approach is not reasonable, and it does not square with existing law.

As an initial matter, respondents' approach again is inconsistent with the federal statute, which explicitly permits officers who are executing a search warrant to require aid from

---

[2] The statute itself deals only with who may serve and execute a search warrant, not with the question of what restrictions, if any, may be placed on the invitation of observers. Moreover, the statute was not intended to be restrictive in operation, but was intended to expand upon prior practice by allowing officers other than those who may be expressly named on the face of the warrant to serve and execute it; as one court has summarized its purpose, the statute "confers no substantive authority to execute a warrant, but was intended to enlarge the common law rule that a search warrant must be directed to a particular person and executed by that person." *United States v. Sigal*, 341 F.2d 837, 843 (3d Cir.), *cert. denied*, 382 U.S. 811 (1965); *United States v. Martin*, 600 F.2d 1175, 1181-82 (5th Cir. 1979) (same).

third parties, whether or not the warrant authorizes their help. *See* 18 U.S.C. § 3105. Indeed, the statute does not impose any express limits on the *kind* of aid that the officers may receive, and thus contemplates not only active assistance in executing the warrant, but also other kinds of aid that may be needed or might reasonably be judged to further their law enforcement mission. Examples of such legitimate aid might include clerical help, medical services, or (in instances where the search is prolonged, as in this case) general administrative or logistical support.[3]

Even more to the point, the Court has never taken such a narrow view of officers' authority to execute a valid warrant. Under the Fourth Amendment, the purpose of a warrant is to confer specific authority either to *search* a particular place for particular persons or things or to *seize* particular persons or things, and to permit an impartial magistrate to engage in independent review of submissions made by oath or affirmation before such authority is conferred. *See Dalia*, 441 U.S. at 255-57. All other aspects of executing a warrant are governed by the pragmatic standard of "reasonableness," which does not prohibit officers from undertaking further actions that are limited in scope and reasonably intended to promote the legitimate objective of effective law enforcement. *See, e.g., id.*; *Ramirez*, 118 S. Ct. at 996.

Thus, for example, when officers execute an arrest warrant by making the arrest, the Court has held that they may proceed to perform a limited search incident to arrest, even though no

---

[3] In any event, respondents' claim that 18 U.S.C. § 3105 is violated by the mere presence of the news media, *see* Resp. Br. 46-47, even where the media personnel were not themselves involved in either serving or executing the search warrant, is not supported by the language of the statute, which speaks only to those actions. *See supra* note 2; *cf. Ayeni v. Mottola*, 35 F.3d 680, 687 (2d Cir. 1994) (statute "identifies those who may 'serve' a search warrant . . . but it has been construed to determine those who may 'execute' a warrant"), *cert. denied*, 514 U.S. 1062 (1995).

such search is expressly authorized by the warrant. *See, e.g., Chimel v. California*, 395 U.S. 752 (1969) (permitting search of person and immediate vicinity); *Maryland v. Buie*, 494 U.S. 325 (1990) (permitting protective sweep of residence). The rationale for the search is that it reasonably furthers important objectives of effective law enforcement by protecting the officers' safety and preventing the concealment or destruction of evidence. *Chimel*, 395 U.S. at 763. In a different vein, the "plain view" doctrine allows officers who are executing a search warrant to seize evidence that was not identified in the warrant if they inadvertently come across it in the course of the authorized search. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion); *Horton v. California*, 496 U.S. 128 (1990). The express rationale for this doctrine is that the "minor peril to Fourth Amendment protections" is outweighed by "a major gain in effective law enforcement." *Coolidge*, 403 U.S. at 467. Respondents' rigid approach to the execution of warrants does not accord with the reasoning of these decisions, which go even further by sanctioning additional unwarranted *searches* and *seizures* as compatible with the "reasonableness" standard embodied in the Fourth Amendment.

As petitioners have noted, there are good reasons why officers may want to have certain third parties accompany them as they execute a warrant. *See* Pet. Br. 19-26. Many of those reasons can reasonably be judged to further the objective of effective law enforcement, even though the third parties do not actively assist the officers by joining in the search for evidence. As long as the actions taken by such third parties are themselves subject to all the familiar constraints of the Fourth Amendment, the officers act reasonably by securing their assistance.

In addition, in many instances it would be reasonable for officers to judge that having certain persons present may directly aid them in executing a warrant. Especially where the third parties can provide a "more accurate version of the events in question," *White*, 401 U.S. at 753, either as witnesses or by

recording the events, or where their presence may help protect the safety of the officers, *see Wilson v. Layne*, 141 F.3d 111, 118 (4th Cir. 1998) (en banc), *cert. granted* No. 98-83, it would be reasonable for the officers to believe that this assistance is material in helping them execute the warrant on the spot.

Respondents make much of the fact that the media have their own purposes for wanting to obtain footage of the events, and suggest that these motivations are relevant in determining whether the resulting search is unreasonable and unlawful. *See* Resp. Br. 21-22, 26-28. This suggestion is in error, however, for the proper inquiry under the Fourth Amendment is limited to evaluating the objective reasonableness of the officers' conduct. Neither their own subjective motivations, *see Scott v. United States*, 436 U.S. 128, 137 (1978), nor the intentions of others are relevant to this inquiry. Were the law otherwise, then the undeniable fact that many informants are motivated by personal animus, or hope for a lighter sentence, could undermine the legality of many established law enforcement practices. Thus the mere fact that the press and the media are typically engaged in a profitmaking venture, which may lead them to seek out information that will be most appealing in capturing the public's interest, has never been thought to denigrate the importance of allowing the press and public to have at least limited access to important government functions. *Cf. City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 420-21 (1993).[4]

---

[4] Respondents also ask, in a series of rhetorical questions, what standards will operate to control "these media actors claimed to be granted access to private property by the Fourth Amendment?" Resp. Br. 19. To begin with, no claim has been made that the Fourth Amendment — or any other constitutional provision — grants any such access, but simply that it does not prohibit officers from making reasonable determinations about when they may be accompanied by third parties as they execute a warrant or engage in other law enforcement functions. In any event, however, the answer to all of these questions is the common law, as described more fully in petitioners' opening brief. *See* Pet. Br. 29-32 (discussing tort claims of trespass and invasion of privacy).

C. Petitioners Acted Reasonably by Allowing News Media to Observe and Record Them Executing the Search Warrant in This Case.

Analyzing the reasonableness of petitioners' conduct in this case requires evaluating both "the character of the official intrusion and its justification." *Michigan v. Summers*, 452 U.S. 692, 701 (1981); *see* Pet. Br. 26-29.

The additional infringement on respondents' privacy from having three media personnel accompany about twenty officers who were already executing a valid search warrant at the ranch was negligible. The media were not permitted to engage in any independent search or seizure of evidence, but merely observed and recorded what the officers themselves saw and heard. The search was limited to open spaces and outbuildings located on the ranch; it did not involve any physical intrusion upon respondents' persons or examination of their personal papers or effects. Moreover, the alleged crimes which gave rise to the search were matters of valid public interest that did not appear to involve any intensely private matters or intimate personal details.

The most obvious justifications for the officers to allow the media to accompany them have been discussed at length in petitioners' opening brief. Petitioners could reasonably judge that the media's involvement would further their law enforcement mission by facilitating accurate reporting of their activities, which would tend to enhance public confidence and improve public oversight; by publicizing their efforts to fight crime, which would help to deter crime; and by ensuring a more accurate record of events, which would help in resolving legal issues that could arise later in ensuing criminal and civil proceedings. *See* Pet. Br. 22-29. Similar reasoning was thought to justify the presence of petitioner McLean at the ranch, which would appear to be unexceptionable under the Fourth Amendment, but which would be illegal under the categorical

approach proposed by respondents. The notion that officers' conduct in executing a warrant should thus be walled off from any first-hand public scrutiny is unreasonable, and would disserve the fundamental constitutional aim of protecting individual liberties against government abuses.

II. THE FOURTH AMENDMENT'S HISTORY DOES NOT SUPPORT RESPONDENTS.

Respondents and their *amici* frequently raise the unpleasant specter of general warrants and writs of assistance in order to suggest that the common practice of media ride-alongs is proscribed by the traditions of the common law. *See, e.g.*, Resp. Br. 33-34. Nothing in the historical record, however, justifies this flawed analogy. Indeed, none of the cited cases or materials suggests that the Fourth Amendment was intended to prohibit officers from making reasonable judgments about when third parties could accompany them to assist in executing warrants and to help them perform their law enforcement functions.

Semayne v. Gresham, 77 Eng. Rep. 194 (K.B. 1604), stands for the proposition that a sheriff could not forcibly enter a house merely to serve civil process. The court was concerned that if such conduct were permitted, then "on any feigned suit, the house of any man at any time might be broke." *Id.* at 198. Yet the court recognized that this situation was distinct from the service of criminal process or a warrant on behalf of the Crown, which confers proper authority upon the officers to serve and execute it even in a home. *Id.* at 195. Blackstone recognized and approved the same distinction, observing that because one's house is regarded as his castle, "no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private." 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *223 (1769).

Respondents' *amici* draw from *Semayne* that it would be improper for an officer to enter a home or to obtain and execute

a warrant solely to serve the personal interests of a private party, rather than to further the government's purposes. *See* NASCAT Br. 15-16, 26; PLF Br. 13. That may well be so, but it has nothing to do with *this* case, in which petitioners properly obtained a valid warrant to search for evidence of crime, which led ultimately to the trial and conviction of Mr. Berger on a federal misdemeanor charge. And, as already discussed, the fact that third parties may have other motives that spur their own participation in law enforcement activities has no bearing on the objective reasonableness of the officers' conduct under the Fourth Amendment. *See supra* page 10.

The classic English cases that preceded the adoption of the Fourth Amendment are also irrelevant here. Respondents and their *amici* cite *Entick v. Carrington*, 19 How. St. Tr. 1029 (K.B. 1765), and *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), in a mistaken attempt to conflate the evils of a general warrant with the very different situation confronted in this case. *See* Resp. Br. 12; NASCAT Br. 22-23. Those evils, however, were twofold, and they were directly eradicated by the specific language of the Fourth Amendment. *First*, the requirement of individualized suspicion underlying most general warrants had been "subjective and largely unenforceable," but this problem was cured by making that requirement "meaningful and enforceable" by requiring independent judicial review of submissions made on oath or affirmation and "raising the required level of individualized suspicion to objective probable cause." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669-70 (1995) (O'Connor, J., dissenting). *Second*, the power conferred by a general warrant was "unbridled" and open-ended, typically avoiding any identification of the places or persons to be searched and the persons or things to be seized, thus allowing officers "to launch forth upon unconfined searches and indiscriminate seizures," a problem that was solved by including the particularity requirement in the Fourth Amendment. *Walter v. United States*, 447 U.S. 649, 653 (1980) (quotation omitted).

Neither problem is presented when media accompany officers who are executing a warrant. The warrant cannot be obtained unless the constitutional standard of probable cause is shown, as judged by a neutral and detached magistrate. And the warrant must be particular, either as to the places or persons to be searched or as to the persons or things to be seized. These are the explicit requirements of the Fourth Amendment, *see Dalia*, 441 U.S. at 257, and they were met in this case. The mere presence of third parties, such as the media personnel here, who themselves are not permitted to exceed the constraints imposed by the Fourth Amendment, does not threaten to foster either of the principal evils that flowed from general warrants, which have long been repudiated in Anglo-American law.

As for the writs of assistance, which "met such vigorous opposition in the American Colonies prior to the Revolution," the problems there were quite similar to the general warrants, though even broader in scope. *Marcus v. Search Warrant*, 367 U.S. 717, 729 n.22 (1961). These writs "empowered the executing officer to seize any illegally imported goods or merchandise. Moreover, in addition to authorizing search without limit of place, they had no fixed duration." *Id.* When James Otis inveighed against "the hated writs of assistance," he was objecting to the fact that they "had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws," *Stanford v. Texas*, 379 U.S. 476, 481 (1965), and thus "granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods," *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978), a power that once granted would remain operative throughout the reign of the current monarch. As one account describes the writ of assistance:

> The writ was particularly vicious in that it was so general and arbitrary. No special writ of search, issued on sworn testimony that the smuggled goods were concealed in a definite place, was needed. The writ

> was not returnable to the court after execution but rather continued indefinitely in effect until the demise of the reigning monarch and for six months thereafter as a license to search and seize uncustomed goods anywhere. The official in possession of the writ therefore had absolute and unlimited discretion in its execution.

Julius J. Marke, *The Writs of Assistance Case and the Fourth Amendment*, in ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER 351, 356 (ed. Morris D. Forkosch 1966).

To suggest that the facts of this case, and the conduct of these officers, bears any remote relationship to the wholesale ransacking of private possessions that flowed from the colonial writs of assistance is to engage in reasoning by epithet. The true evil of the writs of assistance was that they allowed untrammeled exploratory searches of persons, houses, papers, and effects by empowering officers and their agents "to search, at their will, wherever they suspected uncustomed goods to be, and to break open any receptacle or package falling under their suspecting eye." NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 54 (1937). Indeed, in a telling passage from Lasson's classic study of the historical origins of the Fourth Amendment, he takes pains to point out that though the writs of assistance "received their name from the fact that they commanded all officers and subjects of the Crown to assist in their execution," this "*was not the objectionable feature*," and that "the assistance of bystanders may now also be asked in the execution of search warrants." *Id.* at 53-54 (emphasis added).

The historical record thus provides no support for respondents' claim that the origins of the Fourth Amendment demonstrate that it is impermissible for officers executing a warrant to allow third parties to accompany them when they reasonably judge that it would assist them or further their law

enforcement mission to do so. It follows that the historical record provides no "clearly established" law for purposes of the Court's inquiry into the qualified immunity issue either.

III. THE DEFENSE OF QUALIFIED IMMUNITY IS PROPER IN THIS CASE.

It bears emphasis again that the Court has never addressed any of the broader questions raised in this case about when officers may be accompanied or assisted by third parties as they execute a warrant. As a result, the law was not clearly established, and it would not have been apparent to a reasonable officer at the time, that the mere presence of news media to observe and record the execution of the warrant was unlawful. These conclusions are particularly apt where the historical background reflects no clear consensus that such conduct is out of bounds, and indeed seemed to permit and sanction it by recognizing that it reflected customs and practices of long standing. The Court should thus uphold petitioners' defense of qualified immunity.

A. Qualified Immunity Is Proper Under *Mitchell v. Forsyth* Because the Law Was Not Clearly Established at the Time Petitioners Acted.

Qualified immunity is proper unless the officials' conduct violates constitutional rights that were "clearly established" at the time of the events in question. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985).

Mitchell is directly controlling here. There, as here, the plaintiff alleged a violation of the Fourth Amendment. There, as here, the only decisions that had addressed the constitutional issue at the time were opinions by lower courts that had upheld the legality of such conduct, which had been generally permitted for at least a quarter-century. There, as here, the first decisions to disapprove such conduct postdated the events in question,

which eventually led the Supreme Court itself to intervene in order to issue a definitive decision on the constitutional issue. *See* 472 U.S. at 532-36. In view of those circumstances, the Court held that defendants were entitled to qualified immunity because the law had not been "clearly established" at the time, and any "hindsight-based reasoning on immunity issues" would be improper. *Id.* at 535.

The same conclusion is dictated in this case. Several decisions at the time had rejected claims that such conduct violated federal constitutional rights, and no decision had accepted such a claim. *See Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980); *Scott v. State*, 559 So. 2d 269, 272 (Fla. App. 1990). Other courts had recognized that media ride-alongs with police have been a common and accepted custom in this country for more than 25 years. *See* Pet. Br. 42-44 (discussing cases). The only decisions cited to the contrary by respondents — *Ayeni* and *Buonocore*, *see* Resp. Br. 43-45 — were issued subsequent to the events of this case, and stand in conflict with other subsequent decisions, so that the Court has granted a writ of *certiorari* to address the constitutional issue for the first time in this case and in *Wilson v. Layne*, No. 98-83. The briefing submitted in these cases demonstrates that the constitutional issue remains quite unsettled, with judges, lawyers, and commentators plausibly defending very different positions.[5]

---

[5] Indeed, as petitioners noted in their opening brief, the situation here is one where "disparate decisions in various Circuits might leave the law insufficiently certain" to be "clearly established." *United States v. Lanier*, 117 S. Ct. 1219, 1226-27 (1997). That is particularly true where, as here, the constitutional issue has created a clear divide among the circuit courts, with the Eighth Circuit and the Fourth Circuit squarely disagreeing with the Second Circuit and the Ninth Circuit. *See* Pet. Br. 44-48.

Under *Mitchell*, petitioners are entitled to their defense of qualified immunity, for "officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted." 472 U.S. at 535. The officers here, and all other public officials, cannot "reasonably have been expected to be aware of a constitutional right that has not yet been declared." *Procunier v. Navarette*, 434 U.S. 555, 565 (1978).

B. Qualified Immunity Is Proper Under *Anderson v. Creighton* Where It Was Not Apparent that Petitioners Violated the Fourth Amendment.

Even when the law is clearly established as a general matter (which it was not here), qualified immunity is proper if the application of that law to the facts of a particular case would not clearly indicate that the law has been violated. In other words, the contours of the alleged constitutional right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," and thus it "must be apparent" that the situation confronted in a given case comes within the boundaries of the general rule. *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987).

The Fourth Circuit articulated the nub of this issue in its *en banc* opinion in *Wilson*: even if respondents' version of the law — that petitioners violate the Fourth Amendment by permitting "third parties who were not expressly authorized by the warrant and who were not assisting reasonable law enforcement efforts related to the execution of the warrant to accompany them" — had been clearly established at the time, "we could not conclude that it was clearly established that the conduct in which these officers engaged manifestly fell within the ambit of that rule." 141 F.3d at 118. There are many reasons why reasonable law enforcement officers "could have believed that permitting the reporters to observe and photograph the execution of the arrest warrant advanced a legitimate law enforcement purpose related

to the execution of the warrant," including publicizing their efforts to fight crime, making an accurate record of the events, and facilitating accurate media coverage of law enforcement. *Id.*; *see also* Pet. Br. 22-29.

Respondents insist that the media's presence served no legitimate law enforcement purpose in this case, *see* Resp. Br. 22, 26, 33, but their bare assertion in this regard is unpersuasive. Again, the *Wilson* court correctly emphasized the importance of "the distinction between an intent that the reporters assist in the actual execution of the warrant and a reasonable belief that permitting the reporters to accompany the officers served a legitimate law enforcement purpose." 141 F.3d at 118. At the time petitioners acted, "a reasonable officer could have believed" that the media could properly accompany him in light of "the information the searching officers possessed." *Anderson*, 483 U.S. at 641.

One important piece of information available to petitioners at the time was the Justice Department's media policy, which endorsed the practice of allowing officers to "assist the news media in photographing, taping, recording, or televising a law enforcement activity." *See* U.S. Dep't of Justice, *United States Attorneys' Manual* § 1-.000, section VII(B) (Assisting the News Media) (as amended Jan.14, 1993) (Pet. Br. App.). The stated rationale for this policy was precisely to "promote the aims of law enforcement, including the deterrence of criminal conduct and the enhancement of public confidence," which confirms that it would have been reasonable for petitioners to believe that the presence of the media would serve these aims. *Id.* Moreover, since petitioners were merely implementing the terms of that policy, which had not been disapproved or even challenged in any court, they are entitled to qualified immunity in this case. *See, e.g., Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994) (qualified immunity for officers who implemented established policy never before invalidated), *cert. denied*, 115 S. Ct. 1097 (1995); *Sullivan v. Town of Salem*, 805 F.2d 81, 87 (2d Cir.

1986) (officers "simply implementing an established policy" are entitled to qualified immunity); *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980) (officers who followed policy laid down by superiors and not found improper by any court have qualified immunity), *cert. denied*, 451 U.S. 969 (1981).[6]

Because petitioners could have made and did make a reasonable, good-faith judgment that their conduct in allowing the media to accompany them and to observe and record their execution of this search warrant did not violate the Fourth Amendment, the Court should uphold their defense of qualified immunity in this case.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the case remanded with instructions to dismiss the *Bivens* claim brought against petitioners.

Respectfully submitted,

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Counsel for Petitioners

March 1999

---

[6] The certitude with which a later court may ultimately reach its own conclusion on the merits of the underlying claim of substantive right should have no effect on its analysis of the qualified immunity issue. Government officials are shielded by qualified immunity unless the unconstitutionality of their conduct would have been apparent "in the light of pre-existing law." *Anderson*, 483 U.S. at 640; *Harlow*, 457 U.S. at 818.